83-213

IN THE

Supreme Court of the United States

October Term, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., *et al.*,

and

PATRICIA PARISI, *et al.*,

Petitioners,

v.

HUGH L. CAREY, individually and as Governor of the State of New York, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Amicus Curiae.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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Questions Presented

1. Whether the Court of Appeals was correct in holding that the framers of a consent decree—entered on behalf of residents of a state institution for the mentally retarded—intended as their primary goal the reduction of the institution's population to 250 through the transfer of residents to more humane facilities as quickly as possible?

2. Whether the Court of Appeals was correct in holding that if defendant state officials prove that residences accommodating between ten and fifty beds are a professionally acceptable choice for the care of mentally retarded persons, the district court may not direct defendants to only develop residences accommodating ten to fifteen beds?

Parties In Courts Below

The parties to the proceedings below, in addition to those named in the caption, include the following named plaintiffs-appellees: Benevolent Society for Retarded Children, Willowbrook Chapter of the New York State Association for Retarded Children; Lara R. Schneps, by her father Murray B. Schneps; Nina Galin, by her mother Diana Lane McCourt; Anthony Rios, by his father Jesus Rios; David Amoroso, by his mother Rosalie Amoroso; Rose Evelyn Cruz, by her father Franciso M. Cruz; Barry Friedman, by his father Melvin Friedman; Lowell Scott

Isaacs, by his father Jerome W. Isaacs; Antoinette Magri, by her mother Sandra Magri; Anselmo Clarke, by his mother Estella Clarke; Nelson Agosto, by his aunt and next friend Lucilia DeJesus; Frances Breen, by his sister Mary Morganstern as committee of her person and property; John Duffy, by his next friend Robert L. Feldt, Esq.; Evelyn Cruz, by her father Francisco Cruz; Bonnie Rose, by her mother Anne Rose; Mario Nervaez, by his mother Carmen Nervaez; John Doe, by his mother Jane Doe; and Steven Rosepka, by his father Ben Rosepka. (Patricia Parisi sues through her mother Lena Stevernagel).

Additional defendants-appellants below included Zygmond L. Slezak, Commissioner, New York State Office of Mental Retardation and Developmental Disabilities; Thomas Shirtz, Deputy Commissioner, OMRDD; and Ella A. Curry, Director, Frances Ryan, Deputy Director, Clinical Services, and James Walsh, Deputy Director, Institutional Administration, Staten Island Developmental Center (Willowbrook).

NYSARC, Inc., the only corporation, has no parent companies, subsidiaries or affiliates.

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Statement of the Case

This lawsuit, filed in March, 1972, challenged overcrowding and other inhumane conditions and practices at Willowbrook Developmental Center, a facility for mentally retarded persons, operated by respondent state officials. Plaintiffs were the New York State Association for Retarded Children, Inc. (NYSARC), other voluntary organizations, and mentally retarded children and adults

who sued on behalf of all persons residing at Willowbrook. Although a preliminary injunction was entered,[1] the lawsuit was settled before a decision on the merits through a comprehensive consent judgment entered in April, 1975.[2] All litigation since that date[3] has entailed no more than efforts to enforce, interpret and modify that settlement agreement.

The proceedings below began with a motion by defendant state officials (respondents here) to modify the consent judgment's terms relating to overcrowding. The original decree required that Willowbrook's population be reduced to 250 residents. This was to be accomplished in part through the relocation of Willowbrook residents to community facilities accommodating no more than 15 beds "for mildly retarded adults," and no more than 10 beds "for all others." Through a supplemental consent order, defendants had also

1. *New York State Association for Retarded Children, Inc.* v. *Rockefeller*, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). The district court there held that residents of Willowbrook have a constitutional right to "protection from harm" and conditions that comport with "basic standards of human decency." The court's order prohibited seclusion of residents and required the provision of additional hospital care, additional building maintenance and the hiring of additional staff. *Id.*, at 768-69.

2. The Consent Judgment contains a comprehensive listing of "Steps, Standards and Procedures" that defendant state officials must adopt and follow. The consent judgment is extraordinarily detailed. For example, it provides that Willowbrook residents shall "be fed both hot and cold foods and beverages in a normal fashion with due regard for personal hygiene (including washing hands of residents before and after each meal), use of utensils, appropriate dining room surroundings, meal schedules which correspond to normal community standards, with no less than 30-45 minutes allotted to each resident's meal." Joint Appendix in Court of Appeals, p. 44.

3. The Court of Appeals listed the previously reported ten district court and three appeals court decisions entered in this case. Appendix to Petition for Writ of Certiorari (hereinafter "Appendix") A-3, note 1. Many additional unreported opinions and orders were entered by the district court.

agreed to provide, on a trial basis only, community placements of three to six beds for a small group of multiply handicapped Willowbrook residents who had been transferred to Flower Fifth Avenue Hospital. Defendants, in their motion to modify, sought greater flexibility: although they planned many small facilities they sought authority to develop community facilities accommodating up to 50 residents.

Defendants maintained that the modifications sought were necessary in light of difficulties actually experienced in locating and purchasing sites suitable for community residences. In the period 1979-82 defendants were able to open only 131 of 262 sites they had planned for New York City. (Appendix, C-92) The shortfall resulted from obstacles to strict compliance with the decree not fully appreciated when the decree was entered. First, New York's "extremely tight housing market" resulted in a scarcity of sites. Second, a new state statute, providing procedures through which a community may protest and resist the opening of a facility scheduled to house 14 or fewer retarded persons, caused delays resulting in a loss of sites (New York Mental Hygiene Law § 41.34, McKinney Supp. 1982-83). Third, federal and state life safety code requirements for structures housing non-ambulatory persons impeded and frustrated apartment and building acquisitions. The solution, defendants argued, was to develop in some cases somewhat larger facilities. Defendant Office of Mental Retardation and Developmental Disabilities proposed to construct, in fiscal year 1983: 18 community residences of 4-10 beds each; 15 residences of 11-24 beds each; 2 residences of 25-34 beds each; and 3 residences of 35-50 beds each. Note 13, Court of Appeals decision, Appendix, A-21.

Defendants offered the expert testimony of professionals responsible for the State's program for mentally retarded persons and responsible for the State's program at Willowbrook. Defendants also adduced testimony from outside experts. All of these professionals testified that plaintiff class members could be well cared for and served in facilities accommodating between 10 and 50 residents. They also testified that a three to six bed limitation for the residents of Flower Fifth Avenue Hospital would deny those persons necessary medical supervision.

The district court found that the framers of the consent judgment had established as an "essential purpose" of the consent judgment the placement of Willowbrook residents in accordance with the 10/15 bed limitation. (Appendix C-80) It found that the obstacles to achieving this limitation advanced by defendants were insubstantial. (Appendix, C-95—C-97) The district court also adopted the testimony of plaintiffs' experts that the Willowbrook class members would be better served in very small community facilities; that the magic numbers were ten and fifteen, not fifty.

The Court of Appeals reversed. It held that the consent judgment's "primary objective" was to empty Willowbrook, "a mammoth institution." (Appendix, A-29) It described defendants' evidence as a "strong showing" (Appendix, A-21) "unquestionably establishing" (Appendix, A-34) that this primary objective could not be realized unless defendants were granted the modification they sought.

The Court of Appeals further held that the district court applied the wrong standard to the expert testimony

it received from the parties. It was not "appropriate" for the district court "to specify which of several professionally acceptable choices should have been made." *Youngberg* v. *Romeo*, 457 U.S. 307, 321 (1982). It concluded that defendants should be upheld if their professional mental health care providers demonstrated that their policies for the care of Willowbrook residents were the result of "professional judgment in fact exercised."

Summary of Argument

I

The court below held that under *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) and *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968), a modification to a decree should be permitted if it advances the primary purpose of the decree. The appeals court held that the primary purpose of the consent judgment was to reduce Willowbrook's population. It found that the proposed modification—community facilities housing up to fifty residents —would advance that primary purpose and it therefore authorized the modification. Petitioners argue that the appeals court misperceived the consent judgment's primary purpose. They insist that the decree's primary purpose was to create community based facilities of ten to fifteen beds; that the proposed modification therefore abrogated rather than advanced the decree's essential provision and should not have been granted. Petitioners' argument thus turns on an interpretation of the consent judgment and findings of fact. The appeals court holding has no constitutional

significance and entails no departure from controlling decisions of this Court. Certiorari should therefore be denied.

II

Under *Youngberg* v. *Romeo,* 457 U.S. 307 (1982), defendants need only establish that they in fact exercised professional judgment when they sought permission from the district court to develop community facilities accommodating up to fifty beds. Petitioners insist that this standard improperly denies the district court discretion to accept the testimony of plaintiffs' experts advancing alternative approaches to the care of mentally retarded persons. The principle under challenge has several times been decided by this Court and was properly applied by the appeals court. Certiorari should therefore be denied.

Argument

I

One of two standards controls whether a request to modify an injunctive decree will be granted. If the modification is an attempt to frustrate or eliminate the underlying objective of the decree then the modification must be supported by "nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions." *United States* v. *Swift & Co.,* 286 U.S. at 119. However, when the requested modification is premised on a claim and proof that the decree has failed to accomplish its essential purpose and the modification is necessary to realize

the purpose, a very different standard controls. In such cases, the moving party must demonstrate that a "better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." *King-Seeley Thermos Co.* v. *Aladdin Industries Inc.*, 418 F. 2d 31, 35 (2d Cir. 1969). This standard controls in such cases because "a continuing decree of injunction directed to events to come is always subject to adaptation as events may shape the need." *United States* v. *Swift & Co.*, 286 U.S. at 114.

In *Swift*, the modification proposed would have eliminated the decree's prohibition against monopolistic practices and was viewed by the Court as an attempt to obtain "revers[al] under the guise of readjustment." 286 U.S. at 119. Movants were therefore required to demonstrate that a continuation of the decree would be "oppressive" and result in a "grievous wrong." In contrast, in *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 249 (1968), the Court permitted the requested adaptation because it grew out of the parties' experiences operating under the decree and advanced the decree's underlying purpose, achieving "workable competition."

Petitioners' claim that the Court of Appeals ignored *Swift* is baseless. (Petition for Writ of Certiorari, pp. 21-22) The parties and both courts below all agree that *Swift* and *United Shoe* control this case. They also agree with the above statement of controlling principles. But they disagree on the application of these cases and principles to the facts of this case.

The district court found that the placement of Willowbrook residents in small community facilities was an "essential purpose of the Consent Judgment." (Appendix, C-80) It viewed defendants' proposed modifications as an effort to abrogate that purpose. It therefore applied the more stringent standard of *Swift* and *United Shoe*: it asked whether the modification sought—community placements in facilities of up to 50 beds—was necessary to avoid a "grievous wrong." *United States* v. *Swift Co.*, 286 U.S. at 119. The court found that defendants could not satisfy this standard and the modification was denied. (Appendix, C-111)

The Court of Appeals held that the "primary objective" or the "comprehensive goal" of the decree was "to empty such a mammoth institution as Willowbrook" (Appendix, A-29) "transferring . . . [its] population whose squalid living conditions this court has already recited, to facilities of more human dimension as quickly as possible" (Appendix, A-25). It therefore applied the standard more favorable to the moving party: whether the proposed adaptation was based on the parties' experiences operating under the decree and whether it was in furtherance of the decree's primary objective of reducing Willowbrook's population. The Court of Appeals held that defendants satisfied this standard and authorized the proposed modification. Evidence found insufficient by the district court under the more stringent standard was described by the Court of Appeals as a "strong showing" that "the modification was essential to attaining the goal of [reducing Willowbrook's popu-

lation] at any reasonably early date." (Appendix, A-29 and A-21)[4]

Thus the case brought to this Court is essentially a dispute over what the framers of the consent judgment intended as their primary objective. State officials insist that the framers' primary objective was to reduce dramatically Willowbrook's population. Petitioners ask this Court to hold that there was an alternative primary objective. This question, while of obvious importance to the parties, is merely a dispute over findings of fact. It has no constitutional significance or precedential value beyond this case and should not be reviewed here.[5]

4. The elimination of overcrowding at Willowbrook has been and continues to be a critical objective of the parties and the consent judgment. In 1969, three years before the lawsuit was filed, Willowbrook housed 6,200 persons; by the time the suit was filed in March, 1972 it housed 5,700. In 1972, defendants closed admissions to Willowbrook and by December, 1972 the population was reduced to 4,727. *New York State Association for Retarded Children* v. *Rockefeller*, 357 F. Supp. 752, 755-56 (E.D.N.Y. 1973). In 1982, there were 1,369 residents in Willowbrook. (Appendix, A-21)

5. Plaintiffs also argue that permitting modifications to a decree "will lead to unnecessary and protracted litigation" and will force plaintiffs to trial in complex cases. *Petition for Writ of Certiorari*, pp. 23-24. Of course, defendants' principal response is that controlling precedents, *Swift* and *United Shoe* permit modifications, when the appropriate standard is satisfied. In addition, the consent judgment expressly provides for the retention of jurisdiction "for the purpose of construing, implementing, enforcing, or considering motions to amend the Consent Judgment." *New York State Association for Retarded Children* v. *Carey*, 596 F. 2d 27, 32 (2d Cir. 1979). Moreover, defendants are accountable and must daily labor under the provisions of the decree. If defendants are not able to obtain appropriate modifications they—not plaintiffs—will avoid settlement of complex disputes. Finally, plaintiffs' disdain for motions to modify is disingenuous: they have supported modifications to the consent judgment when it was in their interest to do so.

II

Defendant mental health care professionals are daily confronted with controversial, complex, perplexing and emotionally charged issues and decisions. It is too easy to second guess their professional opinions; plaintiffs will often find experts willing to testify that they prefer one form of care to another—in this case that three, six, ten or fifteen bed facilities are superior to ten to fifty bed facilities. Allowing such second guessing places "an undue burden on the administration of institutions" like Willowbrook, "and also . . . restrict[s] unnecessarily the exercise of professional judgment as to the needs of residents." *Youngberg* v. *Romeo,* 457 U.S. at 322. See cases collected in *Youngberg,* 457 U.S. at 322, n. 29. This Court has therefore unanimously held that it is inappropriate for a district court to "specify which of several professionally acceptable choices should . . . [be] made," for residents in a state facility for the mentally retarded. *Id.,* at 321. It is only when defendants abdicate their responsibilities—when they fail or refuse to exercise their professional judgment—that the courts may intervene. *Cf. Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 15-16 (1971) (school authorities must develop constitutionally adequate plans of school desegregation; courts will adopt plans developed by plaintiffs only if defendants abdicate this responsibility).

These clearly controlling principles were correctly applied by the Court of Appeals to this case. Almost 90% of Willowbrook's residents awaiting placements are "severely and profoundly retarded individuals who . . . have

developmental levels between that of an infant and a two year old." (Appendix, C-73) The appropriately trained professionals responsible for New York's statewide program for mentally retarded persons and the appropriately trained professionals who daily care for Willowbrook's residents, as well as other experts called by defendants:

> [W]ere in general agreement that a range of facilities of different sizes up to 50 beds would best serve the Willowbrook class. The quality of care and relationships between staff and residents, it was testified, would not suffer in facilities of . . . [such] size. Moreover, community placements of less than ten beds, according to . . . [two experts] could not be staffed with physicians and therapists necessary for disabled class members and those with special health risks.[6]
> (Appendix, A-24)

The district judge did not consider this expert testimony in light of *Youngberg* because *Youngberg* was decided after the district judge rendered his opinion. The Court of Appeals therefore remanded the case for a finding of whether:

> [T]he views expressed by defendants' experts as to the propriety of the 50 bed limitation constituted 'professionally acceptable choices' or were 'such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.' [*Youngberg*, 457 U.S. at 323]
> (Appendix, A-35)

If on remand the district court finds that defendants satisfied this standard, they must be given the authority—

6. Additional expert authorities supporting defendants' view were identified by the Court of Appeals. Appendix, A-35, n. 19.

the latitude—to care for Willowbrook residents in facilities accommodating up to fifty beds. This was a correct statement and application of the *Youngberg* standard. Certiorari should therefore be denied.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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